Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

PETITION FOR PARTIAL RECONSIDERATION OF THE AMERICAN PUBLIC COMMUNICATIONS COUNCIL, NAVIGATOR TELECOMMUNICATIONS, LLC NII COMMUNICATIONS, and SYMTELCO, LLC

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March 28, 2005

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The American Public Communications Council ("APCC"), Navigator Telecommunications, LLC, Nii Communications, and Symtelco, LLC ("Payphone Commenters") hereby submit this petition for reconsideration ("Petition") of the *TRO Remand Order*.[1] The Petition seeks reconsideration of the Commission's finding that CLECs are not impaired without access to unbundled switching when seeking to provide local service to payphone service providers ("PSPs").

[1] *Unbundled to Network Elements*, Order on Remand, WC Docket No. 04-313, FCC 04-290 (Released Feb. 4, 2005).

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY

In their comments and reply comments, the Payphone Commenters demonstrated that the market for providing local services to PSPs is distinct from the mass market, and that CLECs serving that market are impaired without access to unbundled switching.[2] As the Payphone Commenters demonstrated, the need to treat PSPs as a distinct market segment and the impairment in serving that market stem from the same basic fact: because of the very limited revenues available from payphone lines, CLECs seeking to serve the payphone market through self-provisioned switching cannot recover their costs. The Payphone Commenters showed that this is true not just for CLECs with a PSP-focused business plan, but for all CLECs. Even if a CLEC is able to economically provide switch-based service to other market segments, and the cost of the switch and associated facilities is treated as sunk, it is still not possible to viably enter the PSP market. Based on this showing, the Payphone Commenters sought the preservation of UNE-P for serving the PSP market, regardless of whether the Commission found impairment with respect to the mass market.

The Commission erred in at least three respects in rejecting the Payphone Commenters' showing. First, the Commission mistakenly grouped the Payphone

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[2] *See* Comments of American Public Communications Council, *et al.*, WC Docket No. 04-313 (filed October 4, 2004) ("Comments"); Reply Comments of American Public Communications Council, *et al.*, WC Docket No. 04-313 (filed October 19, 2004) ("Reply Comments"). The Payphone Commenters also demonstrated that the PSP market was distinct from the enterprise market. *See* Comments at 15-15; Reply Comments at 7-8. Since the *TRO Remand Order's* discussion of the PSP market did not address the Payphone Commenters' showings with respect to the enterprise market, this Petition focuses on the Commission's failure to draw a distinction between the PSP market and the mass market.

Commenters with other parties arguing for impairment in other specific distinct markets. The Commission found collective fault with such impairment showings, saying that they failed to "consider[] all the revenue opportunities that such a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell."[3] According to the Commission, "[b]ased on the current record, commenters have not adequately demonstrated that they cannot serve the particular customer or geographic markets at issue in conjunction with other markets in a manner that would make entry economic."[4] The Payphone Commenters, however, made precisely that showing. In their analysis, the Payphone Commenters compared the costs of serving the PSP market with all available revenues from the market and showed that serving PSPs through self-provisioned switching is not viable. It was error for the Commission to have failed to recognize that the Payphone Commenters engaged in precisely the analysis required by the Commission and, at the very least, explain why the analysis was wrong.

The Commission's second error was its dismissal, in a footnote, of the Payphone Commenters' evidentiary showing. The Commission rejected the Payphone Commenters' cost vs. revenues analysis on the grounds that the analysis compared what the Commission said were mismatched cost and revenue data sets. However, as shown below, the Commission was mistaken; the cost and revenue data sets used by the Payphone Commenters were almost precisely matched.

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3 *TRO Remand Order* ¶ 222.

4 *Id.*

Finally, the Commission erred in rejecting the showing that the "at a minimum" language of Section 251(d)(2) requires the Commission to consider as part of its unbundling analysis its mandate under Section 276 of the Communications Act. Section 276 requires the Commission to promote the "widespread deployment of payphone[s]," a goal clearly furthered by providing competitive alternatives to PSPs for their local service. As shown below, the Commission's refusal to consider factors supporting a finding of impairment under its "at a minimum" authority is contrary to the goals of the Act and constitutes reversible error.

DISCUSSION

I. THE COMMISSION IGNORED THE PAYPHONE COMMENTERS' SHOWING THAT CLECS SERVING THE PSP MARKET ARE IMPAIRED WITHOUT UNBUNDLED SWITCHING

The Commission's first error was its refusal to consider the Payphone Commenters' analysis showing why CLECs are impaired in serving the PSP market, regardless of any finding of nonimpairment in the mass market. Both the Commission and the courts have made clear that impairment must be examined on a market-specific basis and that CLECs are impaired with respect to any distinct market if the available revenues do not allow for recovery of the CLEC's costs. The Payphone Commenters made precisely this showing with respect to the PSP market. Yet the Commission never addressed the substance of that showing.

A. The Commission's Decisions and *USTA I* and *II* Required the Commission to Examine Impairment in Each Distinct Market By Comparing All Available Revenues to the Cost of Entry

In considering the *TRO Remand Order*, the Commission was bound to operate under the granular impairment standard required by the U.S. Court of Appeals for the

District of Columbia Circuit in its *USTA I*[5] and *USTA II*[6] decisions. In *USTA I,* the D.C. Circuit had faulted the Commission's prior articulation of the impairment standard for, among other things, being insufficiently focused on the distinctions between various markets. The court objected to what it termed the Commission's overly broad unbundling requirements, on the grounds that they would apply "in every geographic market and customer class, without regard to the state of competitive impairment in any particular market." *USTA I,* 209 F.3d at 422. The court found that the Act requires "a more nuanced concept of impairment than is reflected in findings . . . detached from any specific markets or market categories." *USTA I,* 290 F.3d at 426. As the court later explained in *USTA II,* the Commission is thus "obligated to establish unbundling criteria that are at least aimed at tracking any relevant market characteristics and capturing significant variation." *USTA II,* 359 F.3d at 563.

In the *Triennial Review Order,* the Commission responded to the court by adopting a more refined impairment standard. As the *USTA II* court described the new standard, "the Commission responded to our demand for a more 'nuanced' application of the impairment standard by purporting to adopt a 'granular' approach that would consider 'such factors as specific services, specific geographic locations, the different types and capacities of facilities, and customer and business considerations.'" *USTA II,* 359 F.3d at 563 (quoting *Triennial Review Order* ¶ 118).

In *USTA II* the court generally upheld the new standard, including its narrowed focus on particular markets. *USTA II,* 359 F.3d at 571-72; *see also TRO Remand Order* ¶ 20

5 *United States Telecom Ass'n v. FCC,* 290 F.3d 415 (D.C. Cir. 2002).

6 *United States Telecom Ass'n v. FCC,* 359 F.3d 554 (D.C. Cir. 2004), *cert. denied,* 125 S.Ct. 313, 316, 345 (2004).

("the *USTA II* court upheld the general impairment framework . . . established in the *Triennial Review Order*").[7] In fact, the court rejected the Commission's national finding of impairment with respect to switching precisely *because* it was insufficiently market-specific.[8] According to the court, the Commission's national finding of impairment is "inconsistent with our conclusion in *USTA I* that the Commission may not 'loftily abstract[] away from all specific markets,' but must instead implement a 'more nuanced concept of impairment.'" *USTA II*, 359 F.3d at 563 (internal citations omitted). The court went on to say that:

> [T]he Commission cannot proceed by very broad national categories where there is evidence that markets vary decisively (by reference to its impairment criteria), at least not without exploring the possibility of more nuanced alternatives and reasonably rejecting them.

USTA II, 359 F.3d at 570. Thus, as of the *TRO Remand Order*, the Commission remained obligated to apply the impairment standard on a granular basis, looking separately at any markets that "vary decisively."

In examining impairment in any particular market, the court left in place the standard articulated by the Commission in the *Triennial Review Order*. There, the

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7 While the court sought several clarifications of the standard, none are relevant here. *See USTA II*, 359 F.3d at 572-73; *see also TRO Remand Order* ¶¶ 14-17.

8 In the *Triennial Review Order*, the Commission had first found that CLECs were impaired on a national basis without access to unbundled switching. The Commission then went on to delegate authority to state commissions to engage in market-specific impairment analyses and to rebut its national finding where circumstances dictated. *See TRO Remand Order* ¶ 201. The *USTA II* began by rejecting the Commission's delegation as beyond its statutory authority. In then concluded that, standing on its own, the Commission's national finding of impairment was insufficiently granular. *USTA II*, 359 F.3d at 568-70.

Commission found that the impairment analysis asks "whether all potential revenues from entering a market exceed the costs of entry," with the effect that "entry into a market [is] uneconomic." *Triennial Review Order* ¶ 84.

B. The Payphone Commenters Demonstrated that PSPs Are a Distinct Market Segment and that CLECs Are Impaired in Serving that Market

The entire thrust of the Payphone Commenters' comments was directed to demonstrating that PSPs are a distinct market that must be analyzed apart from the mass market, and that CLECs are impaired in serving that market. The Commission, however, completely ignored the Payphone Commenters' analysis.

In their comments, the Payphone Commenters showed that the PSP market is distinct from the mass market because of the dramatically lower revenues available from PSPs than from the typical mass market customer. Because PSPs order only basic dial tone and do not subscribe to any vertical features or Internet access service, the average PSP line generates only $22.44 a month in revenue, as opposed to more than twice that for the typical mass market customer.

The Payphone Commenters also showed that, with respect to the distinct PSP market, CLECs using UNE-L cannot economically enter the market because the available revenues do not cover the associated costs of providing service. In support of that showing, the Payphone Commenters presented detailed data cost and revenue data demonstrating that CLECs seeking to serve the PSP market would experience a negative margin.

The Payphone Commenters provided an additional analysis in their December 8, 2004 ex parte filing.[9] The ex parte demonstrated that, even where a CLEC is already serving other customers from an existing switch, it is not viable to serve PSPs through UNE-L, because even the marginal costs exceed the revenue available from a payphone line.[10] That net margin analysis, which excluded all switching, collocation, SG&A, and other overhead costs, demonstrates that a UNE-L CLEC cannot viably serve PSPs *even in conjunction with service to other market segments*.[11]

C. The Commission Ignored the Payphone Commenters' Impairment Showing

Despite being precisely the analysis required by the Commission and the court, the Payphone Commenters' impairment showing was ignored by the Commission. The Commission responded to the analysis by lumping the Payphone Commenters' showing in with those of other groups arguing for market-specific impairment findings. The Commission then collectively and summarily brushed aside the showings by saying that they had failed to "consider[] all the revenue opportunities that such a competitor can reasonably expect to gain over the facilities, from providing all possible services that an entrant could reasonably expect to sell." *TRO Remand Order* ¶ 222. *That, however, was precisely the showing made by the Payphone Commenters.*[12]

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9 Letter from Jacob S. Farber, counsel to Payphone Commenters, to Matt Brill, Senior Legal Advisor to Commissioner Abernathy, WC Docket 04-313 (filed December 8, 2004).

10 *Id.* at 1.

11 *Id.*

12 Presumably, when it said "all revenue opportunities," the Commission meant all of the revenue opportunities *for the specific market being examined,* as opposed to the

Whatever the shortcomings of the other commenting parties' analyses, the Commission erred by summarily dismissing the detailed analysis provided by the Payphone Commenters.[13] That failure is brought into stark relief by the Commission's discussion of the failings of other commenters' showings in footnote 612. There, the Commission faulted commenters claiming impairment in rural areas and in the residential market for failing to demonstrate that it is uneconomic to serve those market where a CLEC is also serving the mass market. *TRO Remand Order* ¶ 222 n.612. The fact that the Payphone Commenters were not included in that footnote amounts to an

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(Footnote continued)
revenues available to the CLEC from all markets. If not, then the Commission's analysis is fatally at odds with both its own articulation of the need for market-specific granularity and the guidance it received from the D.C. Circuit on the subject. If, in examining impairment in any one distinct market, the Commission looks at revenues available from all markets, then the obligation to engage in customer segment-market specific analysis is a completely empty one. So long as a CLEC is able to enter some markets, it would be deemed able to enter all markets. Moreover, the notion that if a competitor can enter any one market, it can and should be expected to serve others even if those other markets result in negative margins is simply at odds with how competition works. As AT&T's decision to withdraw from the mass market and concentrate solely on the enterprise market illustrates, if a rational competitor cannot serve a market economically, it exits that market, regardless of whether it can successfully serve other markets with the same facilities.

[13] The Commission's specific error in this regard is compounded by its more general failure to acknowledge its obligation to consider customer-segment market distinctions in its impairment analyses. Notwithstanding both its own commitment to look to specific "customer and business considerations," *Triennial Review Order* ¶ 118, and the court's mandate that it consider differences among "customer class[es]," *USTA II*, 359 F.3d at 563, the Commission refused to engage in any such analysis. In fact, other than the single paragraph in which the Commission dismissed the Payphone Commenters' showing, nowhere in the *TRO Remand Order* does the Commission so much as mention its obligation to analyze impairment in distinct customer markets.

admission that they, unlike the other commenters, did make such a showing. At the very least, the Commission was obligated to explain why the showing made by the Payphone Commenters did not comport with its articulation of the impairment standard.

The Commission's only specific discussion of the Payphone Commenters' analysis consisted of three sentences in footnote 611. That footnote, however, did not respond to the Payphone Commenters' legal analysis. It was limited to a factual discussion of the evidence presented by the Payphone Commenters in support of their showing. The Commission dismissed that evidence by purporting to find a flaw in the underlying data. As shown in Section II below, the Commission was simply wrong in finding that the Payphone Commenters relied on incorrect data. In any case, the Commission never addressed whether, if (as is the case) the data was correct, the Payphone Commenters' showing justified a finding of impairment under the correct legal standard. That failure to address the Payphone Commenters' legal showing constitutes error separate and apart from the Commission's incorrect assessment of the underlying data.[14]

The Commission also erred with respect to the Payphone Commenters in contending that "these commenters' claims are at odds with our impairment standard,

[14] There is a similarity here to the logic of the *USTA II* court's review of the Commission's decision in the *Triennial Review Order* regarding the unbundling of switching. There, having vacated the Commission's delegation to the states, the court found that, standing by itself, the Commission's national finding of impairment could not stand. Similarly, if the Commission's factual objection to the Payphone Commenters' showing is eliminated (which as shown in Section II below it must be) then it is left with no response to the Payphone Commenters' impairment showing.

which evaluates impairment based on a 'reasonably efficient competitor,' not based on the individualized circumstances of a particular requesting carrier." *TRO Remand Order* ¶ 222. While the other commenters' showings may or may not have looked to the circumstances of a particular carrier, the Payphone Commenters' did not. The Payphone Commenters' analysis looked at CLECs generally, was based on aggregated data from several CLECs, and, as discussed above, showed that a CLEC otherwise providing switch-based service could not enter the PSP market.

II. THE PAYPHONE COMMENTERS' EVIDENTIARY SHOWING COMPARED THE CORRECT COST AND REVENUE DATA

The Commission's entire discussion of the evidence presented in support of the Payphone Commenters' impairment analysis is contained in footnote 611. There, the Commission offers two factual bases for rejecting the evidence, both of which are incorrect.

The Commission's first and primary basis for rejecting the Payphone Commenters' showing is that, according to the Commission, it "incorrectly compared costs based on state-specific estimates take from January 2003 BOC filings with average estimated revenues not necessarily related to the actual revenues carriers could earn in those states." *TRO Remand Order* ¶ 222 n.611. This is simply wrong.

The cost figures presented by the Payphone Commenters were taken from two analyses in the *Triennial Review Order* record—one prepared by BellSouth[15] and one

[15] *See* BellSouth Corporation, "CLECs Not Impacted in Using UNE Loops to Compete," enclosed with Letter to Marlene H. Dortch from Glenn T. Reynolds, Vice President-Federal Regulatory, BellSouth, in WC Docket No. 01-388 (January 30, 2003) ("BellSouth Impairment Analysis").

prepared by SBC[16]—that purported to demonstrate that CLECs are not impaired in serving the typical mass market customer, at least in some cases.[17] As the Payphone Commenters explained in the Reply Comments, the use of these figures was, if anything, conservative, because several commenters had argued that the Bell cost figures were too low.[18]

In both cases, the BOC cost figure is the total monthly cost of serving the customer, including SG&A and operating expenses. *See* BellSouth Impairment Analysis at 2, 7; SBC Impairment Analysis, Att. 3 at 2-7. The Payphone Commenters compared the total cost figures with revenue data gathered by the Payphone Commenters. That revenue data was aggregated from actual CLECs serving PSPs, concerning the total amount of revenue, per payphone line, that they receive. As the Payphone Commenters described the data in their Reply Comments, "[i]n response to [an] information request, three CLECs who use UNE-P to serve more than 100,000 payphone

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16 *See* Letter to Chairman Michael Powell from James C. Smith, Senior Vice President, SBC Telecommunications, Inc., CC Docket No. 01-388 (January 14, 2003) and enclosed documents ("SBC Impairment Analysis").

17 Both BellSouth and SBC subtracted their respective cost figures from what they contended were typical revenue figures for a mass market customer to demonstrate that a switch-based CLEC serving such customers would have a positive net margin. Here that same analysis results in a negative net margin.

18 Use of the SBC and BellSouth mass market cost figures is conservative not only because they have been criticized as too low but also because, as the Payphone Commenters demonstrated in their Comments, CLECs incur greater costs in serving the PSP market because of the need to, among other things, add Flex ANI functionality to their switches. Thus, while the Comments assumed that the per-line cost of serving a PSP is the same as for a mass market customer, those costs are actually higher, resulting in even greater impairment.

lines in some 20 states reported average monthly revenue of $22.44 per line." Reply Comments at 10 n.12. Thus, contrary to the Commission's reading, in no sense are the revenue figures estimates—they reflect the actual dollar amounts collected by the CLECs in question.[19]

Moreover, the revenue data was an almost perfect match with the state-specific cost data taken from the BOC filings. BellSouth's cost analysis provided data derived from all nine state in its operating region. The average revenue figures provided by the CLECs included all nine of those states. SBC's cost analysis provided data for California, Michigan, and Texas. The revenue data included California and Texas. Thus, of the 12 states from which the cost data was derived, 11 were among those from which the revenue data was derived.

If the BellSouth and SBC cost figures are each compared to the average revenues for the states in their respective operating regions, the results are no less compelling than the aggregated analysis. The unweighted average[20] of the total revenue figures reported by the CLECs for the BellSouth states was $25.86. Comparing this with the $26.69 cost figure produced by BellSouth results in a margin of -$.83. Similarly comparing the revenues reported by the CLECs for California ($18.76) and Texas ($21.62) with SBC costs for those states ($41.35 and $42.03, respectively) results in a

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19 While the figures from the three CLECs were averaged together, the only alternative would have been to present CLEC-specific revenue data, which presumably would have run afoul of the reasonably efficient competitor standard, which does not look to any specific competitor.

20 The use of an average figure for the entire BellSouth region is necessary to allow for an apples to apples comparison with the BellSouth cost data, which was a region-wide figure.

margin of -$22.59 in Californian and -$20.41 in Texas. These disaggregated results are very close to the region-wide results presented by the Payphone Commenters: a margin of -$4.25 in the BellSouth region and -$17.19 in the SBC region. The data speaks for itself: it is impossible to economically serve the PSP market through self-provisioned switching.[21]

The Commission's second asserted basis for dismissing the Payphone Commenters' showing was that "the commenters themselves concede it is possible to serve payphone service providers using competitive switches in at least some markets." *TRO Remand Order* ¶ 222 n.611. The Payphone Commenters did nothing of the sort. In the portion of their Comments that the Commission cites to, the Payphone Commenters recounted the historical efforts of CLECs to serve the payphone. As the beginning of that discussion made clear, the Payphone Commenters were making exactly the opposite point than the one ascribed to them by the Commission: "Some switch-based CLECs have tried to provide local service to PSPs using UNE-L, but none has been able to do so efficiently." Comments at 17. As the Payphone Commenters explained, "[t]he few switch-based CLECs that actually provided local service to PSPs have gone bankrupt, have exited the payphone segment of the market, or are providing only a *de minimis* amount of service to PSPs." Comments at 18 (internal footnotes omitted).

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[21] The data presented by the Payphone Commenters make this case directly for the SBC and BellSouth states for which the Payphone Commenters were able to obtain cost data. The Commission can and should draw an inference from the substantial number of markets for which data is available to find that CLECs are impaired in all geographic markets in serving the PSP market segment. The Commission found that such an approach was not only reasonable, but was necessary to comply with *USTA II*, in analyzing impairment with respect to loops and transport. *See, e.g. TRO Remand Order* ¶ 87.

Moreover, the Payphone Commenters went on to explain that even the *de minimis* amount of switch-based local service being provided to PSPs is a holdover from the days prior to the Commission's order benchmarking CLEC access rates.[22] Prior to the benchmarking order, when CLEC access rates were significantly higher, the high volume of access code calls from payphones produced considerable additional revenue for CLECs serving PSPs.[23] Comments at 18 n.17. Since the benchmarking order took effect, however, switch-based CLECs have stopped entering the PSP market. *Id.* The point was that, so far as Payphone Commenters are aware, there have been no deployments by CLECs of switch-based service to PSPs since the benchmarking order took effect.

III. THE "AT A MINIMUM" LANGUAGE OF SECTION 251 REQUIRES THE COMMISSION TO FACTOR INTO ITS UNBUNDLING ANALYSIS SECTION 276'S MANDATE THAT IT ENSURE THE WIDESPREAD DEPLOYMENT OF PAYPHONES

The Commission also erred in refusing to, pursuant to the "at a minimum" language of Section 251(d)(2), weigh its obligation under Section 276 to promote payphone deployment in favor of unbundling of local switching. Section 251(d)(2) directs the Commission to consider, "at a minimum," whether access to proprietary network elements is "necessary," and whether failure to provide a non-proprietary element on an unbundled basis would "impair" a requesting carrier's ability to provide

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22 *See Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, 16 FCC Rcd 9923 (2001).

23 The greater revenue opportunity was further compounded by the significantly higher overall volume of payphone calling during the period as compared to today.

service.[24] Throughout the *TRO Remand Order*, the Commission repeatedly utilized the "at a minimum" language to give effect to statutory factors other than impairment in order to justify its decision not to unbundle various elements. As the Payphone Commenters demonstrated, it was similarly obligated to give effect to Section 276 in support of unbundling local switching to serve the PSP market.

Section 276(b)(1) directs the Commission to "promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public." 47 U.S.C. § 276(b)(1). As the Payphone Commenters demonstrated in their comments, there are direct links between the promotion of competition in the provision of local telecommunications service and the goals of Section 276's requirement to promote "competition among payphone service providers" and "widespread deployment of payphone services." The Commission's unbundling rules can significantly advance these goals, but only if CLECs are unimpaired in their ability to compete effectively to serve the PSP market. Thus, as the Payphone Commenters demonstrated, the Commission was obligated to consider Section 276 in analyzing whether to require unbundling of local switching for the PSP market. *See* Comments at 6-16.

The Commission, however, summarily rejected the Payphone Commenters' "at a minimum" showing in a single sentence in a footnote. The Commission said that "[w]e believe that we can best, and most directly, address the payphone industry through our implementation of section 276, which enumerates specific actions for the Commission to take to further the goals it establishes." *TRO Remand Order* ¶ 222 n.607.

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[24] 47 U.S.C. § 251(d)(2).

This, though, is no answer to the Payphone Commenters showing. The Commission's saying that it can pursue the goals of Section 276 though the specific actions enumerated therein is a tautology. It also does not answer the question at issue, which is whether, in addition to pursuing the goals of Section 276 under Section 276, the Commission is also obligated to consider Section 276 under Section 251(d)(2)'s "at a minimum" language.

Implicit in the Commission's treatment of the Payphone Commenters is that the "at a minimum" language is permissive rather than mandatory. However, as the Payphone Commenters demonstrated, "at a minimum" *requires* consideration of other relevant statutory factors in the Commission's unbundling analysis. In their review of the Commission's prior decisions, the courts have consistently stressed that the Commission's impairment analysis and unbundling rules must be "rationally related to the goals of the Act." *AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366, 388; *USTA I,* 290 F. 3d at 428; *USTA II,* 359 F.3d at 562-63. As the D.C. Circuit found, this requires a "balanc[ing]" of the costs and benefits of unbundling with other considerations relevant to the Act. *See USTA II* at 562-63. Whether it undertakes such a balancing is not left to the Commission. As the court said in *USTA II,* its *USTA I* decision "clearly read the Act, as interpreted by the Supreme Court in AT&T, to *mandate* exactly such consideration." *USTA II* 359 F.3d at 580 (emphasis added).

While the Court had before it a balancing of the need for unbundling with factors that militate *against* unbundling, the "rationally related" analysis applies with no less force to statutory factors that weigh in favor of unbundling.[25] Thus, the Commission is

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25 Indeed, in opposing the Commission's weighing of Section 706 against unbundling, the CLECs argued that the proper reading of the "at a minimum" clause is

obligated to take into account other goals of the Act when determining whether CLECs are impaired in providing local service to the payphone market.

The Commission itself has recognized that the balancing of other statutory factors required by the "at a minimum" is mandatory. In discussing the effect of the *USTA II* decision on its switching determinations, it noted that the court's decision "require[s] us . . . to weigh the investment disincentives associated with unbundling." *TRO Remand Order* ¶ 203. If the "at a minimum" language mandates consideration of factors that weigh against unbundling, then it must also require consideration of factors that weigh in favor of unbundling.

The Commission was duty-bound under the "at a minimum" standard to consider how its unbundling policies could contribute to the goals of Section 276. Section 276, like Section 706, mandates that the Commission further the development of a particular sector of the communications industry, payphones in the case of Section 276 and advanced services in Section 706. The courts have made clear that the Commission must consider such statutory goals in determining where unbundling should be required. While, in the case of Section 706 the Commission found that its statutory obligation was furthered by *not* requiring unbundling, it is not free to ignore its obligations under Section 276 because they would *require* unbundling.

(Footnote continued)

that it permits the Commission to "order unbundling even in the absence of an impairment finding if it finds concrete benefits to unbundling that cannot otherwise be achieved . . . ." *USTA II*, 359 F.3d at 579. While the *USTA II* court declined to adopt the CLEC view that "at a minimum" can *only* be used to weight other provisions of the act in favor of unbundling, the court did *not* say that "at a minimum" can never to be used in support of unbundling. *Id.* at 579-80.

As the Payphone Commenters showed, had the Commission correctly factored Section 276 into its analysis, it would have had to conclude that unbundling was required. At the very least, however, the Commission was required to go through the exercise of considering the benefits of unbundling under Section 276. It was not free to, as it did, choose to ignore Section 276's mandate with respect to unbundling. If the Commission is only obligated to engage in "at a minimum" balancing when it suits the Commission's ends, then the language is rendered meaningless.

CONCLUSION

For the reasons shown above, the Commission should partially reconsider the *TRO Remand Order* and find that CLECs are impaired without access to unbundled switching in serving the PSP market.

Dated: March 28, 2005

Respectfully submitted,

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I hereby certify that, on March 28, 2005, a copy of the foregoing Petition for Partial Reconsideration was served via courier on the parties listed below:

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